NAMASIYIAM DORAISAMY

v.

PUBLIC PROSECUTOR & OTHER CASES

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[CRIMINAL APPEALS NOS. 58, 59, 60 & 61 OF 1985]
31 MARCH 1987

CRIMINAL LAW AND PROCEDURE: *Appellants tried under s. 39B(1)(c) of the Dangerous Drugs Act 1952 - Sentenced to death - Appeal - Main brunt of defence that appellants had negotiated a land deal with informer who allegedly acted as agent of an American and that they were victims of a frame-up by the informer - Defence failed to raise any reasonable doubt - Main grounds of appeal - Break in chain of evidence adduced by prosecution - And that the learned Judge erred in law by concluding that appellants guilty of trafficking in heroin instead of the offence of doing an act preparatory to the offence of trafficking - Defence story of land transaction - Whether plausible.*

The four appellants were tried and convicted of an offence under s. 39B(1)(c) of the Dangerous Drugs Act 1952 and were each sentenced to death by the High Court Judge, Penang. They appealed to the Supreme Court.

In the High Court the main brunt of the defence was directed towards Francis Thomas ("Francis"), the informer who it was alleged acted as an agent and negotiated a land deal with them on behalf of an American who was anxious to buy land in Malaysia for the purpose of development and that they were victims of a frame-up by Francis who planted heroin in the 1st appellant's Volvo. Having heard the defence, the learned Judge was convinced that it had failed to raise any doubt as to the prosecution case and considering the evidence as a whole, concluded that the defence seemed to confirm and strengthen the case for the prosecution. He sentenced the appellants to death.

Several grounds of appeal were raised by each of the appellants. There were however two common grounds, *viz:*

(1) The learned trial Judge erred in law in failing to appreciate the break in the chain of evidence adduced by the prosecution regarding the recovery, safekeeping, movements and production of the ten packets of heroin (Exh. P5 AJ) the subject-matter of the charge preferred against the appellants and which had raised a serious doubt in the prosecution case that the exhibits seized by the police at the scene of the crime were the very same exhibits which were produced in Court by the prosecution.

(2) That the learned Judge erred in law by concluding that the appellants were guilty of trafficking in heroin under s. 39B(1)(a) of the Act instead of the offence of doing an act preparatory to the offence of trafficking under sub-section (c) as stated in the charge.

Held:

[1] There was no vital contradiction between the evidence of the chemist and PW3 or PW9. There was sufficient evidence as the movements of the exhibits adduced by the prosecution from the time PW3 handed them to PW9, the time they were kept in the safe under lock and key by DSP Teoh, the subsequent examination by the chemist, the handing back of the

exhibits by the chemist to PW9 and the subsequent keeping of the same in the safe until their production in the trial Court. Their Lordships were more than satisfied that there was no break in the chain of evidence affecting proof as to the identity of the said exhibits.

[2] The trial Judge expressed the view that there was more than sufficient evidence to find the appellants guilty of trafficking in the said drugs even under sub-section 39B(1)(a) of the Act so as to invoke the presumptions under s. 37(d) and (da) of the Act. That was because of the wide definition of trafficking in s. 2 which includes *inter alia* the act of transporting, carrying, sending and delivering etc. Anyway he did not appear to have applied the presumptions but convicted each of the appellants of the charge on the evidence adduced. In the circumstances, their Lordships failed to see how the appellants had any grounds for complaint.

[3] Considering the facts and the circumstances of the case as a whole, the defence story of a land transaction was completely implausible and it was most improbable that the appellants were so naive as to be innocent victims of a frame-up by Francis.

[Appeals dismissed.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B(1)(c), (a), 40, 40A(1), (2)
Evidence Act 1950, s. 114illus.(g)
Penal Code, s. 34

Other sources referred to:
The Supreme Court (of India) on Criminal Law (1950-1960), J.K. Soonavala, pp. 188 to 193

For the appellant Namasiyiam - R. Rajasingam; M/s. Rajasingam & Co.
For the appellant Rajindran - S. Anthonysamy; M/s. Aziz, Anthony & CO.
For the appellant Go - Mahinder Singh Dulku; M/s. Mahinder Singh Dulku & Co.
For the appellant Ng - Paramjit Singh; M/s. Paramjit Singh & Co.
For the public prosecutor - Mohammed Bazin Idris DPP

JUDGMENT

Syed Agil Barakbah SCJ:

The four appellants were tried and convicted of an offence under s. 39B(1)(c) of the Dangerous Drugs Act 1952 and were each sentenced to death by the High Court Judge, Penang. The charge against them reads:

> That you on 20 February 1981, at about 1.30 pm beside the Ambassadress Hotel, Jalan Bangan Luar, in the District of Butterworth, in the State of Penang, in furtherance of the common intention of you all, did on your own behalf do an act preparatory to trafficking in a dangerous drug to wit 1,871.6 grammes of heroin, by arranging to deliver for sale such drug, in contravention of s. 39B(1)(c) of the Dangerous Drugs Act 1952 (Revised 1980) and that you have thereby committed an offence punishable under s. 39B(2) of the same act read with s. 34 of the Penal Code.

Being dissatisfied with their conviction and sentence, they have appealed to the Supreme Court.

Before dealing with the grounds of appeal, we would like to touch on the salient facts of the case as accepted by the trial Judge. This was one of the cases where an officer of the anti-dadah section of the Royal Malaysian Police, Bukit Aman, Kuala Lumpur, Balbir Singh (PW3), worked together with an American agent of the drug enforcement administration of the United

States, in the person of Raymond James McKinnon (PW1). The latter had about twenty-one years' experience in anti-narcotic activities and some time in 1981 was posted to drug enforcement administration Kuala Lumpur and had since assisted in Malaysian Police and customs in this field. He was a professional and claimed to have made four to five hundred arrests in the course of his twenty-one years' service.

On 27 January 1981 as a result of a meeting between the two who have worked before in anti-dadah activities, PW1 informed PW3 of his intended negotiation for the supply of 10 lbs of heroin in Penang. PW3 requested PW1 to keep him informed of future developments on the matter. They met again on 18 February 1981 in the rest house, Penang, where PW1 briefed PW3 and at the same time showed him RM100,000 cash in a briefcase which would be used for the purpose of purchasing the heroin. He also informed PW3 that the money would be kept in the boot of his car AB 3146 and requested PW3 to ensure the security of the money during PW1's meeting with the supplier.

According to PW1, prior to that, on 19 January 1981 he met the first appellant through the introduction of an informer. As a result of discussion, the three of them met again on 26 January 1981 at about 7.30 p.m. at Waterfall hotel, Penang. The discussion ended with PW1 agreeing to buy 10 lbs of heroin at RM16,000 per pound, the supply of which was to be negotiated by the first appellant. PW1 promised to return some time in mid-February with the money. Subsequently on 17 February 1981 PW1 came to Penang and was told by the same informer to meet him and the first appellant at Villa Roma coffee house, Sunrise towers, Penang. PW1 accordingly informed PW3 about his intended meeting the next day requesting PW3 and his police personnel to keep surveillance. The next day at about 11.00 a.m. PW1 drove to Sunrise towers where he was introduced by the informer to the second appellant and the third appellant. He noticed the first appellant was downstairs standing in front of the coffee house. PW1 confirmed his intention of purchasing 10 lbs heroin and showed the third appellant the RM100,000 in the briefcase which was in the boot of his car parked outside the building. The third appellant seemed to be satisfied and returned to the coffee house to join the second appellant and the informer. It was agreed that the supply of the heroin and the payment of the money was to be made from one hotel room to another the next day. However, the plan was aborted when PW1 received a telephone call from the informer that the venue was to be at Kuala Lumpur hotel at Butterworth. PW1 informed PW3 by phone of the change. The next morning on 20 February 1981 at about 10.00 a.m. PW1 accompanied by the informer drove his car to Kuala Lumpur hotel, Butterworth. PW3 and his police party followed in another car. They kept surveillance of the area, observing the movements of PW1 and the others. PW1 and the informer walked to the Glass Corner coffee house on the other side of the hotel. At about 11.30 a.m. the second appellant came in and asked PW1 whether he had the money and was ready to act. Thereafter, the second appellant searched PW1 in the hotel toilet to make sure that he had no weapon. After that, all the three went out and stood on the street where the first and the third appellants joined them. Then the third appellant and the informer walked away to meet a male Chinese in red-flowered shirt and had conversation with him. PW1 identified the man as the fourth appellant. The third appellant and the informer returned and the third appellant informed PW1 that the fourth appellant wanted PW1 to move his car to the front of the coffee house and that they had decided that the exchange of drugs and money was to be made from car to car instead of from room to room as agreed earlier. PW1 duly complied and parked his car as requested. After that, the fourth appellant walked across the street and joined the others. On request, PW1 took the third and fourth appellants to his car where he opened the boot and the

briefcase containing the money and showed to the fourth appellant who had a close look and counted the money. The third appellant then informed PW1 that the fourth appellant would go and get the heroin. PW1 saw the first, second and fourth appellants walk across the street and board a bus which proceeded in the direction of the ferry. The third appellant stayed with PW1. The second appellant returned about fifteen minutes later to join them. There was a discussion and it was agreed that PW1 would inspect the heroin in the first appellant's car while the third appellant would be near PW1's car and after PW1 was satisfied with the heroin, the fourth appellant would give a signal to the third appellant who would then take the money from PW1's car. PW1 handed his car keys to the third appellant. After that, the third appellant and the informer walked to PW1's car while PW1 and the second appellant walked towards the fourth appellant who was standing at an alley where there was a white stationary Volvo with the first appellant at the wheel. The second appellant and PW1 walked to the boot of the Volvo. The fourth appellant took up position from where he could see both PW1's car and the Volvo. (see sketch plan on p. 323 (Exhibit P3) and photo of Volvo at p. 324 of Criminal Appeal No. 61/85). The first appellant alighted and opened the boot of the Volvo. PW1 saw a cardboard box tied with string which he untied and opened the box. He found the plastic bags containing an off white brownish coloured powder (P4 id). (Exhibit P5 AJ). PW1 signalled by waving his hand to the fourth appellant signifying his acceptance. As arranged with PW3 and police personnel who were then present around the area, it was also a signal that the heroin had arrived. It was at that juncture the Police rushed in, while PW1 quickly walked across the street to Kuala Lumpur hotel. About half an hour later, PW3 came and returned to PW1 his car key and briefcase containing the RM100,000.

What transpired during the trap was told by PW3 whose testimony was accepted by the trial Judge (1) confirming the airport meeting with PW1 on 2 July 1981 and thereafter communications between them regarding the drugs deal etc. and (2) his observation at Butterworth on 20 February 1981 which according to the Judge substantiated PW1's evidence. PW3 stated on that day he saw the Volvo with the first appellant at the wheel parked in a lane and PW1 and the second appellant were examining something in the boot. When PW1 gave him the signal, PW3 rushed to the car and detained the first appellant. The second appellant who was running towards the theatre was pursued and apprehended by Cpl. Amiz (PW6). The third appellant was arrested by Inspector Lim (PW4) who took possession of the briefcase from PW1's car and handed it to PW3 with the money still intact. The fourth appellant was arrested by Inspector Khalid.

According to Inspector Lim (PW4) on the day he was making observation in the vicinity of the shophouse in Butterworth, he saw the first, second and fourth appellants boarding a bus heading towards the direction of the ferry. Later he saw the informer open the boot of PW1's car and immediately after the fourth appellant nodded his head, the third appellant grabbed the briefcase from the boot and tried to escape, but he (PW4) pounced upon him and arrested him, PW3 examined the boot of the Volvo and recovered the cardboard box containing ten plastic packets of heroin (P5 AJ). He took possession and custody of both the car and the drugs and issued a search list. After making a report, PW3 handed over all the exhibits to DSP Ghazali (PW9, Deputy OCPD (crimes), of 20 February 1981 at about 5.00 p.m.

At the close of the prosecution case, the learned trial Judge was satisfied that each of the appellants had a case to answer and called upon the defence. All the appellants gave evidence under oath. The defence also called three other witnesses.

The main brunt of the defence was directed towards Francis Thomas, the informer who it was alleged acted as an agent and negotiated a land deal with them on behalf of an American (PW1) who was anxious to buy land in Malaysia for the purpose of development and that they were victims of a frame-up by Francis who planted heroin in the first appellant's Volvo.

The first appellant testified that he was a pirate taxi driver residing at Nibong Tebal and had known the informer as Francis Thomas since 1980. He was also an experienced television and radio repairer and had requested Francis to get clients for him. They became good friends. He admitted that on 19 January 1981 he met Francis who requested him to drive the American (PW1) around sight-seeing in his taxi. He refused as his car was old and not air conditioned. After some drinks, Francis and PW1 left together. He confirmed the second meeting on 26 January 1981 when he accompanied Francis to the Waterfall hotel, Penang, and there met PW1. He understood from Francis who had told him earlier that PW1 had plenty of money and wanted to buy land. Francis conversed with PW1 in English which he could not understand even, though he could speak a little English. He denied that he was a member of a drug syndicate which could sell PW1 10 1bs of heroin at RM16,000 per pound, and maintained that he had never spoke to PW1 or Francis about drugs. The gist of the first appellant's defence was that he acted on the request of Francis who hired his taxi as transport, for which Francis paid him RM200. As regards the event of 18 February 1981 at Villa Roma coffee house, Sunrise towers, Penang, he stated that he went there in response to the request by Francis who subsequently arrived with the second and third appellants. While they went up to the coffee house, he remained downstairs and chit-chatted with a friend on the five-foot-way. He confirmed that subsequently PW1 and the third appellant came downstairs and walked to a car parked nearby where the boot was opened and both looked into it. Later, on Francis' request, he drove him, the second and the third appellants in his Volvo and dropped them at the pier. Francis paid him RM10 for petrol and asked him to meet him at the E & O hotel, Penang at 8.30 a.m. the next day. On 20 February 1981 he arrived at the appointed time. Francis told him to wait for PW1 and borrowed his car, driving it away and returned about twenty-five minutes later. Since PW1 had not yet arrived, Francis told the first appellant to drive to Kuala Lumpur hotel, Butterworth and to wait for him there. The first appellant did so. Francis and PW1 arrived about forty-five minutes later. After having breakfast, the first appellant saw Francis, PW1, the second and the third appellants standing in front of the Glass Corner coffee house and joined them. Later, the fourth appellant also joined the group. Francis introduced the first appellant to the fourth appellant.

With regard to his Volvo, the first appellant stated that soon after the meeting, on instruction of Francis to park it in front of the Glass Corner coffee house he drove it to the main road accompanied by the second appellant and made a 'U' turn. As he was nearing the parking place, the fourth appellant stopped him and requested for the loan of the Volvo. In spite of his reluctance, he had to yield and the fourth appellant drove off alone. He and the second appellant returned to the spot in front of the coffee house to join Francis, PW1 and the third appellant. Soon after, the fourth appellant returned and informed them that the Volvo had broken down along the main road. Accompanied by the second and fourth appellants, the first appellant went to the Volvo and checked the faulty gear and repaired it. Then he drove the Volvo accompanied by the other two towards the ferry terminal at Butterworth. On arrival there, the fourth appellant appeared to be looking for someone, but soon gave up and they all returned in the Volvo with the first appellant at the wheel to the same coffee house. The first appellant parked the Volvo in a lane of a parking bay situated between the Ambassador coffee house and the Rex theatre in compliance with Francis' earlier instruction.

(see sketch plan Exhibit P3 in the appeal record). He still remained in the car to adjust a nut near the gear. He noticed on turning round that PW1 and the second appellant opening the boot of his car. However he carried on adjusting the gear lever. He was surprised when a pistol was pointed at his right temple by PW3. He alighted, handed over the car keys to PW3, after which he was handcuffed and taken to Butterworth police station.

The defence of the second, third and fourth appellants are conveniently taken together. The second appellant was a fisherman and met Francis in 1981. As he was in financial difficulties, he requested Francis to get him a job. On their second meeting, Francis told him a wealthy friend of his wanted to buy land in order to put up a factory for sea food processing and asked him to look for suitable land in the area. Subsequently, the second appellant met an old friend, the third appellant, by chance near a market to sell his land. He conveyed the news to Francis who suggested a meeting with the third appellant on 18 February 1981. On that day, both crossed over by a ferry to Penang where Francis took them to Villa Roma coffee house and they met PW1. After the normal introduction, Francis asked the third appellant about the land and there was discussion also with PW1. Subsequently, Francis told the second appellant that PW1 had agreed to buy the land and requested him to arrange for a meeting with the third appellant that and his father at about 10.00 a.m. on 20 February 1981 at the Glass corner house near the Rex cinema, Butterworth. On the appointed day, the second appellant came to Butterworth and after some inquiry found the place and met Francis and PW1 seated at a table. He told Francis the third appellant would be coming later, Subsequently, he accompanied the first appellant in the Volvo car. He corroborated the first appellant's evidence about making a 'U' turn along the main road and on the way back, meeting the fourth appellant who took over the Volvo, about accompanying the first appellant to repair the car, and later accompanying the first and fourth appellants to the ferry to wait for the third appellant's father. After that, the first appellant returned to their rendezvous and parked the Volvo between the Glass Corner coffee house and the Rex theatre but remained in the car. Later, on Francis' instruction, the second appellant took PW1 to have a look in the boot of the Volvo. Then he saw two persons rushing towards him. He ran back towards Rex theatre but was arrested. The gist of the second appellant's testimony was that he was acting as a land broker to sell the land belonging to the third appellant's father to PW1.

The third appellant was a poultry farmer but as his business was failing, his father wanted to assist him embark on a new business and raise the capital by selling his land. The old man asked the third appellant to look for a buyer. Subsequently, he met the second appellant who negotiated with PW1 for the sale of the said land through Francis. He repeated the same story as that of the second appellant regarding their meeting with PW1 and Francis in Penang at Villa Roma coffee house and their negotiation about the sale of land. According to Francis, PW1 wanted to see the title deed since he agreed to buy the land. After that, at Francis' request, the third appellant went to see the currency notes in RM50 denomination kept in a briefcase which was placed in the boot of a car parked outside the building downstairs.

The next day he received a telephone call from the second appellant telling him of a pending meeting at Butterworth and to bring along the title deed. That night the fourth appellant, a distant relative of the third appellant, paid him a visit in his house. When the third appellant told him about his land deal, the fourth appellant said he too had a piece of land to sell. He agreed to the former's suggestion that he accompanied him to Butterworth the next day to see a foreigner who was interested in buying land. On arrival at Butterworth, the third appellant met the second appellant who was in the company of Francis and PW1. He told Francis

about his father's late arrival and about the fourth appellant who also had land to sell. Francis walked with him to meet the fourth appellant who was waiting across the road at Tan Chong Motors. After a short conversation, all the three walked back to join PW1 who was with the first and second appellants.

The rest of the evidence was a repetition of the borrowing of the Volvo by the fourth appellant from the first appellant, the breaking down of the Volvo on the way and the repair made by the first appellant who drove it back to the parking lot. While the first appellant remained in the Volvo, Francis took the third appellant to PW1's car also parked nearby. Francis opened the boot and asked the third appellant to pick up a briefcase in the boot. As the third appellant was doing so, he was caught and arrested by the police.

With regard to the fourth appellant's evidence, he confirmed the meeting with the third appellant and accompanied him to Butterworth for the purpose of negotiating the sale of his own land with Francis who was introduced to him by the third appellant. He also met the first and second appellant and PW1. He also confirmed that he drove the Volvo on the instruction of Francis to fetch the third appellant's father at the pier but the car broke down on the way. He returned to tell Francis and the first appellant of the breakdown and of his intention to go home as he was not sure that PW1 was a genuine buyer. Francis pacified him by showing a briefcase containing money kept in the boot of a car parked in front of the Ambassador coffee house. He was impressed and rejoined Francis and the first, second and third appellants. Later, they proceeded to the Volvo and after repairs the first appellant drove the fourth appellant to the ferry to meet the third appellant's father. They returned without meeting the man. After the first appellant parked the Volvo in a lane near Rex theatre, the fourth appellant went to the Ambassador coffee house to ease himself. Later, as he was walking out he was arrested by a police officer.

Having heard the defence, the learned Judge was convinced that it had failed to raise any reasonable doubt as to the prosecution case and considering the evidence as a whole, concluded that the defence seemed to confirm and strengthen the case for the prosecution. He found each of the appellants guilty as charged and passed the death sentence on each of the appellants as required by law.

There were several grounds of appeal raised by each of the appellants in their memorandum of appeal which we dealt with together. There are however two common grounds, viz:

(1) The learned trial Judge erred in law in failing to appreciate the break in the chain of evidence adduced by the prosecution regarding the recovery, safe-keeping, movements and production of the ten packets of heroin (Exh. P5 AJ) the subject-matter of the charge preferred against the appellants and which had raised a serious doubt in the prosecution case that the exhibits seized by the police at the scene of the crime were the very same exhibits which were produced in Court by the prosecution.

(2) That the learned Judge erred in law by concluding that the appellants were guilty of trafficking in heroin under s. 39B(1)(a) of the Act instead of the offence of doing an act preparatory to the offence of trafficking under sub-section (c) as stated in the charge.

As regards ground (1), according to prosecution evidence, after PW3 had seized the ten packets of heroin placed in a box in the boot of the Volvo he took them to police station, Butterworth where he marked the packets E1 to E10 respectively and the box as E before he handed them over to DSP Ghazali (PW9), the investigation officer, at about 4.00 p.m. on the same day, i.e., 20 February 1981. PW9 having taken possession of the said exhibits handed

them to DSP Teoh of the same police station for custody in the safe. DSP Teoh maintained a safe register as required under the IGP instructions in order to ensure custody and record the movements of the exhibits kept therein. (Exh. P14). He died before the case was heard and could not therefore be called as a prosecution witness. It was submitted that there is no record whatsoever in the safe register that the Exhibits P5 AJ were kept in the safe between 20 February 1981 and 23 February 1981 since the first and only entry in P14 relating to the said exhibits being kept in the safe was on 24 February 1981. There was no other entry of the said exhibits being made of their movements being recorded prior to that date. The learned trial Judge considered the matter and rightly concluded that the safe register had not been reliably maintained. It was further submitted in the circumstances that the prosecution had failed to reach the required standard of strict proof that Exh. P5 AJ were the very same exhibits handed over to the government chemist (PW5) for analysis and as a result there was a gap in the chain of evidence raising a grave doubt that the exhibits produced in Court were the very ones seized by PW3.

The learned trial Judge however considered the evidence of PW9 who having been recalled for further examination and cross examination supplied evidence regarding the alleged missing link. According to PW9 he himself on 20 January 1981 handed the exhibits to DSP Teoh and saw him keep them in the safe and thereafter DSP Teoh locked the safe. On 23 February 1981 he took out the same exhibits from the knowledge and in the presence of the DSP in order to hand them over to the chemist for analysis. But since the chemist was very busy on that day, he handed the exhibits back to DSP Teoh and saw him keep them in the same safe under lock and key. The next time he took out the exhibits again was on 24 February 1981 which as stated earlier was recorded in the register.

Apart from PW9's explanation which was accepted by the learned Judge, there was also the evidence of PW3 who identified in Court during the trial the Exhibits P5 AJ as the ones he had seized from the boot of the Volvo on the day in question and which he handed over to PW9, by the letters E1 to E10 which he had written on the said packets on 20 February 1981 and his initials below them. Similarly the chemist (PW10) also identified the exhibits as the ones he had checked and analysed by the same letters E1 to E10 on the packets. PW9 also identified the exhibits by the same markings. The only discrepancy which was pointed out to us was that the chemist stated in his evidence that he saw only the marking and nothing else indicating, according to the defence Counsel, that there were no initials on the packets. We had the occasion to call for the said exhibits during this appeal and noted that apart from the bold letters E1 - E10 on the packets respectively, there were also the initials and the date written below each of them. We are satisfied that there is no vital contradiction between the evidence of the chemist and PW3 or PW9. We are also satisfied that there was sufficient evidence as to the movements of the exhibits adduced by the prosecution from the time PW3 handed them to PW9, the time they were kept in the safe under lock and key by DSP Teoh, the subsequent examination by the chemist, the handing back of the exhibits by the chemist to PW9 and the subsequent keeping of the same in the safe until their production in the trial Court. We are more than satisfied that there is no break in the chain of evidence affecting proof as to the identity of the said exhibits.

With regard to common ground (2), the trial Judge in fact found each of the appellants guilty as charged under s. 39B(1)(c) of the Act and convicted them accordingly. (see pp. 209 and 312 of the appeal record). In his grounds of judgment in dealing with the defence evidence, the trial Judge expressed the view that there was more than sufficient evidence to find the appellants guilty of trafficking in the said drugs even under sub-section 39B(1)(a) of the Act so as to invoke the presumptions under s. 37(d) and (da) of the Act. We agree with him.

That is because of the wide definition of trafficking in s. 2 which includes *inter alia* the act of transporting, carrying, sending and delivering etc. Anyway he did not appear to have applied the presumptions but convicted each of the appellants of the charge on the evidence adduced. In the circumstances, we failed to see how the appellants have any grounds for complaint.

The First Appellant

Now, we would like to touch on the grounds raised by the first appellant at para. 4(iv), 6, 7, 8 and 10 of the memorandum. It was submitted that the learned trial Judge failed to appreciate that the whole of the prosecution case against the first appellant fell short of a *prima facie* case in respect of the charge framed, and that mere association with the other accused persons without any other admissible evidence could only tantamount to suspicion against the first appellant whose meetings with PW1 on the two earlier occasions had no connection or link whatsoever with the negotiations PW1 had with the second and third appellants on 18 February 1981. The learned Judge in the circumstances should have acquitted the first appellant at the close of the prosecution case without calling for his defence.

It must be noted that according to positive evidence accepted by the trial Judge the first appellant was the first person introduced by Francis to PW1 on 19 January 1981 at Church Street, Penang and both had a general discussion regarding PW1's intention to invest his money for good profits in Malaysia. The second meeting took place about a week later on 26 January 1981 at about 7.30 p.m. at Church Street, Penang where the three met again at Waterfall hotel, Penang. In the course of their discussion, the first appellant agreed to arrange for the supply of 10 lbs of high quality heroin for the price of RM16,000 per pound, with his associates. PW1 agreed to purchase the amount for RM160,000 and promised to return in mid-February with the money. As promised, PW1 came for the third time on 18 February 1981 and met Francis, the second and the third appellants at Villa Roma coffee house, Sunrise towers. There a final deal was effected. Although the first appellant did not take part in the negotiation, PW1 inquired about him and was told the first appellant was downstairs. PW1 saw him standing by the front door. PW4 who was making observation, also saw the first appellant there. It was clear that the meeting on that day was a follow-up of the plan agreed upon between PW1 and the first appellant on 26 January. The last event on 20 February 1981 was at Butterworth where PW1 met the second appellant who ascertained from PW1 that he was ready with the money in order to carry out the transaction. It is true at that point of time the first appellant was not there. However, PW1 saw him later walking with the second and fourth appellants across the street and catching a bus headed for the ferry point. Subsequent events as proved by the prosecution which led to the discovery of the drugs in a box kept in the boot of the first appellant's car after the first appellant had driven it to the parking bay until his arrest, all pointed to one conclusion only, i.e. that he was knowingly involved in the crime with which he was charged. Clearly his association and actions in the futile attempt to deliver drugs went beyond the realm of suspicion. We agree that the trial Judge was correct in calling upon the first appellant to make his defence.

On similar grounds the first appellant's defence that he was a mere innocent tool in the hands of Francis who merely hired him to drive his taxi was rejected by the trial Judge. Apart from playing an important role in the earlier negotiations, his futile attempt to deliver the drugs to PW1 and other cogent evidence, the trial Judge also found him not to be a witness of truth. He was caught lying in maintaining that he could not understand the conversations between PW1 and the informer on the two occasions that they met when it came to light in Court that he understood English. These, in our view, are sufficient grounds for the Judge to reject the defence and convict the first appellant of the charge.

The Second Appellant

The first ground of appeal was abandoned by his Counsel. We would like to touch on the second and third grounds together since they relate to PW1 and Francis whose participation in the case was manifested by evidence stated earlier. In the case of PW1 it was clear from the facts and surrounding circumstances that he was an agent provocateur. As such, he is protected by the provision of s. 40A(1) and (2) of the Act in that he is not presumed to be unworthy of credit and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person, is admissible. Similarly, any statement made to him by an accused person shall be admissible at the trial. There is therefore no requirement for the evidence of an agent provocateur to be corroborated. That is not the case however with the informer, Francis. Evidence revealed that he took an active part from the beginning till the end of the episode by introducing PW1 to the first and second appellants, at times acting as PW1's spokesman, was present in all the meetings between PW1 and the appellants and lastly participated in the trap set up by PW1 and the police leading to the arrests of the appellants and the seizure of the drugs. It appeared that his involvement in assisting PW1 in trapping the appellant was known to the police who throughout the trial called him an informer. In the circumstances of the case, he is not and cannot be termed as an informer within the meaning of s. 40 of the Act and cannot claim any protection from disclosure of his name and address or any matter which might lead to his discovery under the Act. On the contrary, no disclosure was necessary because he was known to the appellants who appeared to trust him. Clearly, Francis was a *particeps criminis*, an accomplice in the true sense of the word. It was submitted that the absence of Francis at the trial would raise the presumption under s. 114(g) of the Evidence Act unfavourable to the prosecution. Be that as it may, in the light of overwhelming prosecution evidence as stated earlier, we do not think that the presence of Francis, had he been available, would have made any difference.

The last ground alleges that the learned trial Judge failed to consider the defence adequately.

The gist of the appellant's defence as evaluated by the learned Judge was that he was merely a broker trying to find a willing seller of land to PW1. He succeeded in getting the third appellant to sell his father's land. Having regard to the second appellant's involvement in the negotiations on the two occasions in Penang and Butterworth as deposed by the prosecution witnesses, the manner in which the transactions were carried out and his overall conduct in the deal, we agree with the learned Judge in finding the second appellant guilty as charged.

The Third Appellant

It was submitted the learned Judge was wrong in rejecting the third appellant's defence in that he meant to sell his father's land and not heroin and was a victim of a frame-up by Francis.

Firstly, the Judge held that the land alleged to be the subject-matter of sale to PW1 did not belong to the third appellant's parents only but to a third co-owner who was never informed of the proposed sale nor his concurrence obtained for the purpose. Reference was made to the agreement of sale of the said land made subsequently on 10 August 1981. The recitals to the agreement and para. 11 thereof clearly show that the land belongs to a third person, the original owner and vendor who has applied for the sub-division of the said land into lots and the issue of separate documents of title and pending that it is stipulated the original agreement of sale executed between the third appellant's parents and the original vendor

was binding upon the parties to the present agreement. The learned Judge never said there were three vendors but there was a third co-owner who had to be consulted and whose concurrence was necessary before the sale could be effected.

Secondly, he held that it was premature for the third appellant to check on PW1's means on 18 February 1981 to purchase the land when at that stage all that had taken place was a preliminary discussion. He went on to say that such conduct of inspecting the money in the car would be more conducive to the proposed sale of heroin as put forward by the prosecution. It was submitted that the learned Judge failed to take into account the appellant's testimony that he did so on Francis' request in order to convince him of PW1's financial standing and of his ability to purchase land. We are satisfied that the Judge has taken that into account when he held that such conduct was rather unusual for a *bona fide* transaction of sale and purchase of land. He went on to consider as in the third ground that there was no evidence of any inspection of the land, no searches made in the land register and no solicitors consulted, although many such firms were readily available in Butterworth at the time.

It was further submitted that there was evidence that the third appellant received a telephone call from the second appellant to meet him at Butterworth the next day at about 10.00 a.m. in order to see PW1 and to take him to view the land. If that was true that the third appellant came to Butterworth for the purpose, what was the reason for him to get mixed up with the other appellants in the act preparatory to trafficking heroin on that day? There was no reason for him to accompany Francis to open the boot of PW1's car and take out the briefcase containing the cash when having already seen the money earlier, he had not yet met and spoken to PW1 about the sale of his father's land. Surely his action cannot in the least be consistent with that of a man who has came to see PW1 to negotiate a *bona fide* land deal. It must also be noted that at almost the same time as the third appellant was taking the briefcase containing the money, PW1 was being shown the drugs in the boot of the first appellant's car which was parked not far away, by the second appellant.

We do not propose to deal with the remaining grounds which, in our view, are minor and serve no purpose.

The Fourth Appellant

The main ground touched upon by the fourth appellant's Counsel was that the learned Judge erred in law in failing to appreciate that the evidence adduced by the prosecution pertaining to "common intention" was far from satisfactory. In other words, it was the defence contention that the prosecution had failed to prove that the fourth appellant had committed the offence "in furtherance of the common intention" of all the four appellants and he should have been acquitted by the trial Judge at the close of the defence. Section 34 of the Penal Code states:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.

Where the prosecution case rest on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (*The Supreme Court (of India) on Criminal Law* (1950-1960) by J.K. Soonavala p. 188 to 193).

With regard to the fourth appellant, it was submitted that he went to the spot at the request of the third appellant to meet PW1 and was involved only on the day of arrest. He had not met PW1, Francis, the first or the second appellant prior to that. In our view, the evidence as told by Francis to PW1 that the fourth appellant was the boss of the syndicate and wanted to see the money was not admissible as being hearsay and prejudicial to the defence. Nevertheless, the conduct of the fourth appellant including the part that he played as seen by the prosecution witnesses and admitted in some instances by the appellant himself, is relevant.

In our considered judgment, the facts and circumstances of the case including the conduct of the fourth appellant which raise the inference of common intention may be summed up as follows.

Firstly, after the arrival of the fourth appellant at Butterworth on 20 February 1981, all the appellants including PW1 and Francis gathered together at the meeting place at Butterworth. Then the third appellant informed PW1 that the fourth appellant wanted PW1 to move his car to the front of the coffee house because they had decided that the exchange of drugs and money was to be made from car to car. PW1 accordingly complied with the request and parked his car at the place as requested.

Secondly, on their request, PW1 took the third and fourth appellants to see the money in the boot of his car. The fourth appellant counted the money in the briefcase and appeared to be satisfied with it.

Thirdly, it was rather strange that the fourth appellant, who had just been introduced to Francis on that day by the third appellant, acted on the instruction of Francis to drive the first appellant's Volvo to fetch the third appellant's father instead of the third appellant himself doing it. The fourth appellant had to walk to the main road to stop the first appellant who was then driving the Volvo back to the meeting place.

Fourthly, the fourth appellant was alone driving the car for some time until he came back to inform the rest that the car had broken down. According to the defence evidence, the first appellant went to repair the gear and thereafter drove the fourth appellant to the pier to meet someone but returned subsequently to the meeting place where the first appellant remained in the car. It would have been more appropriate for the fourth appellant to ask the first appellant to drive him to the pier instead of taking over the car on his own, if at all the story of fetching the third appellant's father was true.

Fifthly, when both PW1's car and the first appellant's Volvo had been parked in their respective places, the fourth appellant took up position where he could see the two stationary vehicles and give a signal for the exchange of the heroin which was then in the boot of the first appellant's Volvo with the cash which was in the briefcase in the boot of PW1's car.

Lastly, what transpired after that has already been dealt with earlier showing that all the four appellants were caught red-handed in a police trap in broad daylight after the police had made observation of their movements until they approached the two stationary cars to complete their transaction. The action of the second appellant in accompanying PW1 to the Volvo to enable PW1 to take possession of the heroin in the boot, the action of the first appellant who was seated at the driver's seat in coming out to open the boot for them, the part played by the third appellant and Francis in going to PW1's car and opening the boot for the purpose of taking delivery of the money and, last but not least, the participation of the fourth appellant in giving a signal to him to finalise the transaction, lead to one and only one inference *viz.* that there was a common intention to commit the very offence with which the appellants are convicted of and the commission of the intended offence was done in furtherance of that common intention.

Considering the facts and circumstances of the case as a whole, we are satisfied that the defence story of a land transaction was completely implausible and that it was most improbable that the appellants were so naive as to be innocent victims of a frame-up by Francis.

In the circumstances, we dismiss the appeals and confirm the conviction and sentence of each of the appellants by the trial Court.

Also found at [1987] 1 CLJ 540